Wherefore, it is prayed that the Board hear this proceeding and determine.

(a) That the Commissioner erroneously included as income for the year 1929 interest received in the amount of $3,117.50.

(b) That any assessment for the year 1929 is barred by the statute of limitations.

(c) That petitioner is not subject to the Federal Income Tax Law for the year 1929.

[fol. 4] (d) For such other and further relief as the Board may deem meet and proper in the premises.

F. M. Goodwin, Jay W. Whitney, Thomas J. Reilly, Attorneys for Petitioner, Mills Building, Washington, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

F. M. Goodwin, Jay W. Whitney, and Thomas J. Reilly, state that they are attorneys duly authorized to represent the above named taxpayer; that they have prepared the above named petition and believe the facts stated therein are true; that they have just been recently employed by the Interior Department to represent this petitioner and due to insufficient time have not had this petition verified; that they respectfully request that the Board accept this petition in order to protect the taxpayer's rights, and state that an amended petition will be filed in accordance with the Board's rules or order.

F. M. Goodwin, Jay W. Whitney, Thomas J. Reilly,

EXHIBIT "A" TO PETITION

NP-2-28.

Treasury Department

Office of Commissioner of Internal Revenue

Washington, March 29, 1932.

Superintendent Five Civilized Tribes, for Sandy Fox, Creek No. 1263, Muskogee, Okla.

SIR: You are advised that the determination of your tax liability for the year (x) 1929 discloses a deficiency of $167.00, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may [fol. 5] petition the United States Board of Tax Appeals for a determination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return (x) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessement of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement Form 882, Form 870.
627M

Statement

IT: AR:E-1, RCC-60D.

In re: Superintendent, Five Civilized Tribes, For Sandy Fox, Creek No. 1263, Muskogee, Okla.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$269.59	$102.50	$167.00

The records of this office disclosed that you received $3,117.50 in the form of interest on a refund of income tax during the year 1929. Interest paid on such refund is taxable income for the year in which received. Inasmuch as this office is unable to identify this item in your return, the amount has been included resulting in a deficiency of $167.00.

Net income reported on return		$16,149.17
Add:		
Interest		3,117.50
Adjusted net income		$19,266.67
[fol. 6] Less:		
Interest on Liberty bonds	$8,351.75	
Personal exemption	3,500.00	
Credit for dependents	400.00	$12,251.75
Balance subject to normal tax		$7,014.92
Normal tax at ½% on $4,000.00		20.00
Normal tax at 2% on $3,014.92		60.30
Surtax on $19,266.67		190.67
Total		$270.97
Less:		
Earned income credit		1.38
Correct tax liability		$269.59
Tax assessed		102.59
Deficiency		$167.00

Statement

Superintendent, Five Civilized Tribes, For Sandy Fox, Creek No. 1263.

You were advised in office letter dated February 25, 1932, that it would be necessary to hold any conference in Washington, D. C., that might be desired with regard to the proposed adjustment before March 10, 1932. Inasmuch as this period has expired and no request has been received, this formal notice of deficiency is issued.

Before U. S. Board of Tax Appeals

Amended Petition—Filed June 20, 1932

The above named petitioner, hereby petitions for a redetermination of the deficiency as set forth by the Com-

missioner of Internal Revenue in his notice of deficiency dated March 29, 1932, symbols IT:AR:E-1 RCC-60D, and as a basis of this proceeding alleges as follows:

1. The said notice of deficiency (a copy of which, marked Exhibit A, is attached to the original petition) is dated March 29, 1932. The petitioner has no knowledge as to the date it was mailed.

[fol. 7] 2. The taxes in controversy are income taxes for the calendar year 1929 in the sum of $269.59.

3. The determination of taxes as set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including as income for the year 1929 an amount of $3,117.50 received as interest on a refund of income tax during the year 1929.

(b) The Commissioner erred in exacting any taxes from this petitioner for the year 1929.

4. The facts upon which the petitioner relies as a basis of this proceeding are:

(a) During the year 1929 the Commissioner determined that the petitioner was not subject to the Federal Income Tax laws and accordingly refunded sums of taxes which he determined to be illegally paid. In accordance with law, interest was refunded on these illegal payments in the amount of $3,117.50; this amount being received during the year 1929. The Commissioner has erroneously determined that this interest is subject to Federal Income Tax.

(b) Petitioner is a ward of the United States, being a member of the Creek Nation or Tribe of Indians, being enrolled opposite Creek Roll No. 1263. His property both real and personal is under the control of the United States, being under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior. The income from his allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior; and the income interest upon such investments is likewise received and held by said superintendent as part of his restricted funds and property. During the year 1929, there was included in

petitioner's return, an amount of $7,797.42 representing interest upon petitioner's restricted funds; said amount being held by the said Superintendent and was not subject to the demand of the petitioner. There was also included as part of petitioner's gross income, an amount of $8,351.75, representing interest on Liberty Bonds. Accordingly petitioner erroneously paid an income tax for the year 1929 in the amount of $102.59. Wherefore, it is prayed that the Board hear this proceeding and determine:

[fol. 8] (a) That the Commissioner erroneously included as income for the year 1929 interest paid in the amount of $3,117.50.

(b) That petitioner is not subject to the Federal Income Tax Law for the year 1929.

(c) For such other and further relief as the Board may deem meet and proper in the premises.

A. G. McMillan, Acting Superintendent, Five Civilized Tribes, For Sandy Fox, Creek #1263. Thomas J. Reilly, F. M. Goodwin, Jay W. Whitney, Attorneys for Petitioner, Mills Building, Washington, D. C.

Duly sworn to by A. G. McMillan. Jurat omitted in printing.

[fol. 9] BEFORE U. S. BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed July 26, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits that the notice of deficiency (a copy of which, marked Exhibit A, is attached to the original petition) is dated March 29, 1932. Denies the remaining allegations contained in paragraph 1 of the amended petition.

2. Admits that the taxes in controversy are income taxes for the calendar year 1929. Denies the remaining allegations contained in paragraph 2.

3. (a), (b). Denies the assignments of error contained in subparagraphs (a) and (b) of paragraph 3 of the amended petition.

4. (a), (b). Denies the allegations contained in subparagraphs (a) and (b), of paragraph 4 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Of Counsel: B. M. Coon, F. S. Gettle, Special Attorneys, Bureau of Internal Revenue.

7/23/32.

BEFORE U. S. BOARD OF TAX APPEALS

STIPULATION OF FACTS—Filed December 13, 1932

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the following facts shall be taken to be true, provided however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not [fol. 10] inconsistent with the facts herein stipulated to be taken as true:

I

Petitioner is a full-blooded restricted Creek Indian being enrolled opposite Creek Roll No. NB1263.

II

His property both real and personal is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior.

III

The income from petitioner's allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior.

The income interest from such investments is likewise received and held in trust as part of petitioner's restricted funds and property.

IV

For the calendar year 1929 the Superintendent filed for petitioner an income tax return and the said Superintendent paid the tax shown thereon to be due for restricted funds of petitioner in his possession.

V

Included in petitioner's tax return for 1929 was an amount of $7,797.42 received by said Superintendent upon petitioner's restricted funds. There was also included in said return an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Neither of these sums were subject to petitioner's demand.

VI

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 refunded to said Superintendent for petitioner the following taxes which had been paid by the Superintendent as follows:

[fol. 11]

Year	Tax	Interest
1914	$ 95.43	$ 79.15
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

There was also refunded during 1929 interest computed according to law on said refunds in the amount of $3,117.50, said interest being paid to the said Superintendent for petitioner. This interest is part of petitioner's restricted funds and is not subject to his demand.

VII

That the interest set-forth in paragraph VI has never been returned for income tax purposes by said Superintendent or petitioner.

Thomas J. Reilly, Attorney for Petitioner, C. M. Charest (BMC), Attorney for Respondent.

Before U. S. Board of Tax Appeals

Restricted Indians—Taxability of Income from Reinvested Tax Exempt Funds—Petitioner is a full-blood restricted Creek Indian. The income from his tax exempt allotted lands is received and held in trust for him by the Superintendent of the Five Civilized Tribes. During the taxable year 1929, the superintendent also received and held in trust for petitioner certain income from the reinvestment of the tax exempt income. Held, the income from the reinvested tax exempt income is subject to the Federal income tax, since there is no Federal statute, treaty or provisions of the Constitution providing for its exemption.

Thomas J. Reilly, Esq., for the petitioner.

B. M. Coon, Esq., for the respondent.

Opinion

Promulgated December 26, 1933

Black:

This proceeding is for the redetermination of a deficiency in income tax for the calendar year 1929 in the amount of $167. The amended petition alleges that the amount of taxes in controversy is $269.59, which amount includes the original assessment of $102.59, and assigns two errors, as follows:

(a) The Commissioner erred in including as income for [fol. 12] the year 1929 an amount of $3,117.50 received as interest on a refund of income tax during the year 1929.

(b) The Commissioner erred in exacting any taxes from this petitioner for the year 1929.

The facts were stipulated as follows:

Petitioner is a full-blood restricted Creek Indian, being enrolled opposite Creek Roll No. NB 1263.

His property, both real and personal, is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior.

The income from petitioner's allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise re-

ceived and held in trust as part of petitioner's restricted funds and property.

For the calendar year 1929 the Superintendent filed for petitioner an income tax return and the said Superintendent paid the tax shown thereon to be due for restricted funds of petitioner in his possession.

Included in petitioner's tax return for 1929 was an amount of $7,797.42 received by said Superintendent upon petitioner's restricted funds. There was also included in said return an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Neither of these sums were subject to petitioner's demand.

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 refunded to said Superintendent for petitioner the following taxes which had been paid by the Superintendent as follows:

Year	Tax	Interest
1914	$ 95.43	$ 79.13
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

[fol. 13] There was also refunded during 1929 interest computed according to law on said refunds in the amount of $3,117.50, said interest being paid to the said Superintendent for petitioner. This interest is part of petitioner's restricted funds and is not subject to his demand.

That the interest set forth in the paragraph just above has never been returned for income tax purposes by said Superintendent or petitioner.

The net income of petitioner as determined by respondent is shown in the statement attached to the deficiency notice as follows:

The records of this office disclosed that you received $3,117.50 in the form of interest on a refund of income tax during the year 1929. Interest paid on such refund is taxable income for the year in which received. Inasmuch as this office is unable to identify this item in your return, the amount has been included resulting in a deficiency of $167.00.

Net income reported on return		$16,149.17
Add:		
Interest		3,117.50
Adjusted net income		$19,266.67
Less:		
Interest on Liberty Bonds	$8,351.75	
Personal exemption	3,500.00	
Credit for dependents	400.00	
		12,251.75
Balance subject to normal tax		$ 7,014.92

The relationship between the Government and the "restricted" Indian is that of guardian and ward. Tiger v. Western Investment Co., 221 U. S. 286, 310-317; United States v. Waller, 243 U. S. 452, 459. In the instant proceeding Sandy Fox is the ward, and the pleadings were properly filed for him by the Superintendent of the Five Civilized Tribes, who is the officer of the Interior Department directly in charge of the restricted Indians of such tribes. See sec. 143 Revenue Act of 1928; Rule 6 of the Board's Rules of Practice; and sec. 17, ch. 222, Act of August 1, 1914, 38 Stat 582, 598.

[fol. 14] It is contended on behalf of petitioner that he is totally exempt from the Federal income tax on all the income involved in this proceeding because of his status as a full-blood restricted Creek Indian. The case of Mary Blackbird vs Commissioner, 38 Fed. (2d) 976, is especially cited in support of that contention. Mary Blackbird was a full-blood restricted Osage without a certificate of competency. Her principal source of income was from bonuses and royalties on tribal mineral leases. She also received a small amount as surface rental, a few dollars from miscellaneous sources, and $100 each year as interest on funds held in trust for her by the United States. In holding her not subject to the income tax statute the Tenth Circuit said, in part:

She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects "the net income of every individual" to

the tax, this is also sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specially delat with. Elk v. Wilkins, 112 U. S. 94, 100, 5 S. Ct. 41, 44, 28 L. Ed. 643: "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." In Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941, the court, after noting the general rule that exemptions from taxation are to be strictly construed, said at page 675 of 224 U. S., 32 S. Ct. 565, 569:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases."

The Solicitor General of the United States did not ask for a writ of certiorari in the Blackbird case.

[fol. 15] On the same day that the Tenth Circuit decided the Blackbird case, it also decided Choteau v. Commissioner, 38 Fed. (2d) 976, and held that where an Osage Indian had received his "certificate of competency" he was subject to the income tax.

The Supreme Court granted a writ of certiorari in the Choteau case and later affirmed the Board and the decision of the Circuit Court of Appeals. Choteau v. Burnet, 283 U. S. 691. While it is true that in the Choteau case the taxpayer was an Indian who had received his "certificate of competency" and in that respect was different from the instant case, where the petitioner is a restricted Indian with all the income in question having a restricted status, nevertheless, we think that the Supreme Court made it plain in the Choteau case that the exemption applying to the income of certain classes of Indians was not as broad as stated by the learned court of the Tenth Circuit in Mary Blackbird v. Commissioner, supra. In the Choteau case, the Supreme Court, among other things, said:

It is further insisted that, since the royalties are not taxable so long as they remain in the hands of the government in trust for the tribe and undistributed to members, income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt. • • • Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power • • • on the ground that while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. The intent to exclude must be definitely expressed, where, as here, the general langauge of the act laying the tax is broad enough to include the subject matter. • • • But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royaltjes to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax. • • • There is therefore nothing in the nature of the income which excepts it from the effect of section 213 (a) of the Revenue Act of 1918.

[fol. 16] The real test, therefore, it seems to us, of the applicability of the Federal Income Tax laws to the income of Indians is whether such income or the property which produces such income is specifically exempted from taxation, either in the tax statutes or other legislation dealing particularly with Indian affairs. This was the test applied by the Tenth Circuit in the two recent cases of Bagby v. United States, 60 Fed. (2d) 80, and Lucinda Pitman v. Commissioner, 64 Fed. (2d) 740.

The court in the Pitman case, after considering the applicable provisions of the Act of May 27, 1908 (35 Stat. 312), concluded as follows:

We conclude, therefore, that the homestead remained restricted and exempt from taxation, and that the surplus allotment became freed of restrictions and subject to taxation from and after sixty days from May 27, 1908.

In the instant proceeding the respondent is not proposing to tax any income from petitioner's allotment. Respondent in his brief admits that the income of a restricted Indian from restricted lands is exempt from taxation, but contends

that there is no provision of law or treaty which exempts income from *income from* Federal taxation, for example, interest from a refund of Federal income tax such as exists in the instant case. In making this contention respondent is following G.C.M. 9621 (X-2 C.B. 111) in which it was held that income of a restricted Indian of the Five Civilized Tribes, including the Choctaw Tribe, from the reinvestment by the Interior Department of tax exempt income from his restricted allotted lands is taxable to the same extent as the investment income of other citizens and residents of the United States. The income which the respondent has determined in his deficiency notice to be taxable is the income received from the reinvestment of the exempt income. This identical question was before us in R. E. Snell, Jr., 10 B.T.A. 1081, wherein we said in part:

> The source of the income which we are considering here is not the petitioner's homestead allotment, but is United States notes purchased and deposits made with the income from the allotment. When that income was received for the petitioners by the Superintendent of the Five Civilized Tribes, it was separated from its nontaxable source and when invested became itself a new source of income, which [fol. 17] is not protected from taxation either by the Revenue Act of 1918 or by prior acts of Congress under which the homestead allotment was made. We are therefore of the opinion that the interest on the Government notes and bank deposits involved herein is subjected to tax under the Revenue Act of 1918.

Our decision in the Snell case was made prior to the decisions in the Blackbird, Choteau, Bagby, and Pitman cases, supra. With the exception of the Blackbird case, we see nothing in these cases which would require a reversal of our holding in the Snell case; and we regard the holding in the Blackbird case as having been somewhat modified by the later decisions in the Choteau, Bagby, and Pitman cases. Furthermore, we believe the holdings in McCurdy v. United States, 246 U. S. 263; United States v. Ransom, 263 U. S. 691; and Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, all tend to support the decision made in the Snell case. These cases all stand for the proposition that where lands which are subject to taxation and owned by non-Indian citizens are purchased for a restricted Indian, under the supervision of the Secretary of the Interior, with moneys derived

as royalties from departmental leases of the Indian's restricted allotment, the act of the Secretary in restricting such purchased lands as to alienation can not have the effect of exempting such lands from state taxation, in the absence of an express provision by Congress to that effect. In Shaw v. Gibson-Zahniser Oil Corp., supra, the Supreme Court, after observing that the plan of the Government has been gradually to emancipate the Indian from his former status as a ward, said:

> • • • In this as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.
>
> In a broad sense all lands which the Indians are permitted to purchase out of taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be [fol. 18] inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks. [Citations.] These lands we take to be of that character.
>
> The principle thus announced as to lands and their taxability would appear to be just as applicable to new acquisitions of personal property and the income therefrom. See also United States v. Gray (C. C. A., 8th Cir.), 284 Fed. 103.

Returning now to the Blackbird decision, counsel for petitioner, in his brief, observes: "One of the items under consideration in the Blackbird case was interest on funds held in trust by the United States, the identical issue presented in this Appeal." This is, of course, literally true as

to the $100 item, but the point of law involved in the Snell case was not discussed by the court in the Blackbird case, and, as we have previously indicated, it is our opinion that the Blackbird decision was somewhat modified by the later decisions in the Choteau, Bagby, and Pitman cases.

Counsel for petitioner emphasizes the fact that the income in question is held in trust by the superintendent and was not subject to petitioner's demand. This is of course true in all cases where there is a guardianship relationship. But the income itself is not exempt from taxation unless it is somewhere so provided. The respondent does not propose to subject the Liberty bond interest of $8,351.75 to the normal tax. Aside from this item of income being exempt from the normal tax, the items of income here involved are not exempt by virtue of any provision in any treaty with the Indians, the Sixteenth Amendment to the Constitution, the Revenue Act of 1928, or any other statute of the United States. The determination of the respondent is approved.

Reviewed by the Board.

Decision will be entered for the respondent.

[fol. 19] Before U. S. Board of Tax Appeals

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated, it is

Ordered and Decided: That there is a deficiency in income tax of $167.00 and no overpayment due the petitioner for the year 1929.

(Signed) Eugene Black, Member.

Entered Dec. 29, 1933.

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

Filed January 27, 1934

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Superintendent, Five Civilized Tribes for Sandy Fox, in support of this, his petition filed in pursuance of the provisions of Section 1001 of the Revenue Act of 1926 as

amended by Section 1101 (a) of the Revenue Act of 1932, for the review of the decision of the United States Board of Tax Appeals rendered on the 29th day of December, 1933, approving deficiencies in income taxes for 1929 in the amount of $167, respectfully shows to this Honorable Court as folows:

I. Statement of the Nature of the Controversy

Under the provisions of the Revenue Act of 1928, petitioner duly filed with the United States Board of Tax Appeals a petition and an amended petition requesting a redetermination of a deficiency asserted by the Commissioner of Internal Revenue and asserting that petitioner was not subject to the Federal Income Tax Law. The respondent filed an answer to petitioner's amended petition and the cause being at issue was submitted on an agreed stipulation of facts at a hearing before the United States Board of Tax Appeals on December 13, 1932.

It was stipulated that petitioner is a full-blood restricted Creek Indian and that his property, both real and personal, is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the [fol. 20] direction and supervision of the Secretary of the Interior.

The income from petitioner's allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise received and held in trust as part of petitioner's restricted funds and property. For the calendar year 1929 the Superintendent filed for petitioner an income tax return and the said Superintendent paid the tax shown thereon to be due for restricted funds of petitioner in his possession.

Included in petitioner's tax return for 1929 was an amount of $7,797.42 received by said Superintendent upon petitioner's restricted funds. There was also included in said return an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Neither of these sums were subject to petitioner's demand.

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 refunded to said Superintendent for petitioner the following taxes which had been paid by the Superintendent as follows:

Year	Tax	Interest
1914	$ 95.43	$ 79.15
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

There was also refunded during 1929 interest computed according to law on said refunds in the amount of $3,117.-50, said interest being paid to the said Superintendent for petitioner. This interest is part of petitioner's restricted funds and is not subject to his demand.

That the interest set forth in the paragraph just above has never been returned for income tax purposes by said Superintendent or petitioner.

From the above statement of facts, the United States Board of Tax Appeals held as a matter of law that the restricted income from restricted property of a restricted member of the Five Civilized Tribes is taxable to said [fol. 21] member, although the income is received by the Superintendent for the Indian, becomes a part of the Indian's restricted funds, and is not subject to the Indian's demand.

II. Designation of Court of Review

The petitioner being aggrieved by the said findings of fact, opinion, decision and order, and being an individual desires a review thereof in accordance with the provisions of the Revenue Act of 1926 as modified by the Revenue Act of 1932 by the United States Circuit Court of Appeals for the Tenth Circuit whereof he is an inhabitant.

III. Assignments of Error

The petitioner, as a basis for review, makes the following assignments of error:

1. The Board erred in holding that under the stipulated facts in this case that petitioner is subject to the federal income tax laws when it was shown that petitioner is a full blood restricted Creek Indian; that the income in question is restricted income from restricted property, is received by the Superintendent of the Five Civilized Tribes for petitioner, is held in trust by the said Superintendent and invested by him under the direction of the Secretary of

the Interior, is a part of petitioner's restricted funds and is not subject to his demand.

2. The Board erred in not following the law as set forth in the decision of this honorable court in the case of Mary Blackbird v. Commissioner, 38 Fed. (2d) 976.

3. The Board erred in entering judgment for the respondent.

Wherefore your petitioner prays that this honorable court may review said findings, opinion, decision and order and reverse and set aside the same and that this court grant such other and further relief as the court may deem meet and proper in the premises.

Superintendent, Five Civilized Tribes for Sandy Fox.

F. M. Goodwin, Jay W. Whitney, Thomas J. Reilly, Attorneys for Petitioner.

[fol. 22] *Duly sworn to by Thomas J. Reilly. Jurat omitted in printing.*

Before U. S. Board of Tax Appeals

NOTICE OF PETITION FOR REVIEW

Filed January 27, 1934

To E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

You are hereby notified that a petition for review in the above-entitled cause was filed with the United States Board of Tax Appeals on the 27th day of January, 1934.

A copy of said petition is served upon you herewith.

Thomas J. Reilly, Attorney for Petitioner.

Service accepted this 27th day of January, 1934.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Before U. S. Board of Tax Appeals

DESIGNATION OF RECORD

Filed January 27, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, on or before the 28th day of March, 1934, transmit to the clerk of the Circuit Court

of Appeals for the Tenth Circuit, certified copies of the following documents:

[fols. 23 & 24] 1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.

2. Petition.

3. Stipulation of Facts.

4. Amended petition.

5. Answer to amended petition.

6. Findings of fact, opinion and decision of Board.

7. Petition for review to the Circuit Court of Appeals for the Tenth Circuit and acknowledgment thereof.

8. This designation of record and acknowledgment thereof.

9. The foregoing to be prepared, certified and transmitted as required by law and the rules of the Circuit Court of Appeals for the Tenth Circuit.

Thomas J. Reilly, Attorney for Superintendent, Five Civilized Tribes for Sandy Fox.

January 27, 1934.

Service of a true copy of the above præcipe for the record is hereby acknowledged this 27th day of January, 1934.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Clerk's Certificate to foreging transcript omitted in printing.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION.—Sept. 10, 1934

Before Honorable Robert E. Lewis, Honorable George T. McDermott and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard, no one appearing for petitioner, Frank J. Wideman, Esquire, appearing for respondent.

Thereupon this cause was argued by counsel for respondent and was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 1038

September Term, 1934

Thomas J. Reilly, F. M. Goodwin, Jay W. Whitney, and Leahy, MacDonald & Files, filed a brief for petitioner.

Frank J. Wideman, Asst. Attorney General (Sewall Key and J. P. Jackson, Spec. Assts. to Attorney General, were with him on the brief) for respondent.

Before Lewis, McDermott, and Bratton, Circuit Judges.

McDermott, Circuit Judge, delivered the opinion of the court.

OPINION.—January 9, 1935

This petition to review a decision of the Board of Tax Appeals presents this close and difficult question: Where the guardian of a restricted Indian has invested moneys saved from the income from his ward's allotment, is the income from such investments taxable under the federal income tax law? It has been authoritatively decided that income received from his allotment, and income received by him from tribal property held in trust is not subject to income tax. Blackbird v. Commissioner (C. C. A. 10) 38 F. (2d) 976. It has been authoritatively decided that lands purchased for investment from such savings, although restricted, are subject to taxation by the state. Shaw v. Oil Corporation, 276 U. S. 575; United States v. Ransom [fol. 26] (C. C. A. 8) 284 F. 108, affirmed 263 U. S. 691; United States v. Gray (C. C. A. 8) 284 F. 103; United States v. Mummert (C. C. A. 8) 15 F. (2d) 926. But whether the income from restricted property so acquired is subject to the federal tax has not been before the courts.

Sandy Fox is a full-blood restricted Creek Indian, whose property both real and personal is under the direct supervision and control of the Superintendent of the Five Civ-

ilized Tribes and the Secretary of the Interior. The income from his allotment being in excess of his needs, the surplus was invested for him by the Superintendent, and the income from such investments was held by the Superintendent in trust as part of the restricted property. In 1929 the Superintendent returned for taxation income derived from such invested savings in the sum of $16,149.17 and a tax of $102.50 thereon was assessed and paid. The Commissioner added to his return $3,117.50 interest on a tax refund received in the taxable year from the government and assessed a deficiency of $167.00. In a review before the Board of Tax Appeals, the taxpayer resisted this deficiency assessment and sought to recover the $102.50 paid. The Commissioner's ruling was in accord with a memorandum of its General Counsel, G. C. M. 9621; the Board of Tax Appeals affirmed the Commissioner in accord with an earlier decision directly in point. Snell v. Commissioner, 10 B. T. A. 1081.[1]

The interest received from the government on amounts erroneously paid in preceding years, is income received by the taxpayer during the taxable year, as were the amounts returned and on which the tax of $102.50 was paid. If this income is exempt from taxation, it must be either because of the status of the taxpayer or because of the nature of the income.

In Blackbird v. Commissioner (C. C. A. 10) 38 F. (2d) 976, this court held that the income[2] of a restricted Osage

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[1]The interest received from the government is not exempt under the section exempting interest upon government bonds. Helvering v. Stockholms Enskilda Bank, —— U. S. —— (decided November 6, 1934).

[2]Mary Blackbird's income was more than $24,000, of which all but $30.96 was from her allotments or from minerals and funds held by the United States in trust for the members of the Osage Tribe. The $30.96 may have been income from invested savings, but this item was not considered, either in the briefs or our opinion, as differing from the other income. The question now before us may have lurked in the record in that case, to the extent of

Indian was not within the purview of the Income Tax [fol. 27] Statutes, and Judge Lewis cited many authorities to the point that general acts of Congress do not apply to Indian wards of the government unless an intention to include them was clearly manifested. This court at the same time held that this general rule did not apply to an Osage Indian who had been granted a certificate of competency enabling him to alienate any of his property except his homeste-d. Choteau v. Commissioner (C. C. A. 10) 38 F. (d) 976.

The Blackbird and Choteau Cases were decided by one opinion. The government acquiesced in the ruling in the Blackbird Case, but certiorari was granted in the Choteau Case. In its opinion in the Choteau Case, 283 U. S. 691, the Supreme Court expressly disclaimed an intent to pass upon the taxability of the income of an incompetent Indian. It affirmed the decision of this court on the ground that Choteau had the power to alienate his surplus allotment, and that it was taxable by the state. That decision does not reach our case, for Sandy Fox could not alienate. Some of the language of that opinion may be pertinent for, without mentioning its expressions in earlier opinions, the court said:

"The language of §§ 210 and 211 (a) (40 Stat. 1062) subjects the income of 'every individual' to tax. Section 213 (a) (40 Stat. 1065) includes incomes 'from any source whatever.' The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. • • • The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter."

$30.96, but receiving no consideration, the case is not controlling on the point now under consideration. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U. S. 507, 511. And, also, Satterlee v. Harris (C. C. A. 10) 60 F. (2d) 490.

Concerning the government's general policy toward the Indian, the court said:

"The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for com- [fol. 28] plete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes."

Following the decision in the Choteau Case, this court was confronted with Pitman v. Commissioner, 64 F. (2d) 740. The taxpayer there was a full-blood Creek. The power of Creeks to alienate their allotments depends upon the quantum of blood. Act of May 27, 1908. By Section 4 of that Act, unrestricted lands were subject to taxation. Section 9 of that Act provided that the death of an allottee removed all restrictions then existing, except that full-blood Indian heirs could not convey without the consent of the probate court. Mrs. Pitman inherited from her son some lands unrestricted in his lifetime, and a restricted homestead. This court held that, notwithstanding the taxpayer was a full-blood Creek, and as such not manifestly included in the federal taxing statute, her income from unrestricted land was subject to tax while her income from the restricted land was not.

These decisions support the conclusion that a full-blood Indian is an individual embraced within the term "every individual" as used in the federal taxing statute; that such exemption from taxation as he enjoys arises, not from his blood or race, but from the nature of the property giving rise to the income. But in the cases so far considered, the property from which the taxable income was derived was unrestricted and subject to state taxation. In our case, the property giving rise to the income is restricted, as is the income itself.

We come then to the question of whether the fact that land is restricted exempts it from taxation. That question has not been answered as far as federal taxes are concerned, but it has been conclusively answered as to state taxes. Commencing with the opinion of Judge Lewis in United States v. Gray, 284 F. 103, the Eighth Circuit Court

of Appeals has consistently held that where lands, previously unrestricted and subject to taxation, were purchased with proceeds of the sale of restricted land, held in trust by the United States, and where the lands purchased were restricted in the hands of the Indian, such lands were subject to state taxation. United States v. Ransom (C. C. A. 8) 284 F. 108; United States v. Mummert (C. C. A. 8) 15 F. (2d) 926.

[fol. 29] In Shaw v. Oil Corporation, 276 U. S. 575, the guardians of a minor full-blood Creek purchased lands with moneys of their ward which had accumulated from the income of the ward's original restricted allotment. The purchased lands were alienable only with the approval of the Secretary of the Interior. An oil and gas lease was executed. The state undertook to impose its gross production tax on the oil produced. The Supreme Court held the Secretary had the power to reimpose restrictions on lands once unrestricted, but held

"The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them, are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by Congress and that the mere act of the Secretary in imposing the restriction is not the exercise of any power which may reside in Congress to exempt them from taxation. • • • In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land."

Nothwithstanding that the court was dealing with a restricted, full-blood, minor Indian, the court held that the duty of paying taxes was one step in the emancipation of the Indian, saying:

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with a performance of an essential governmental function than were the restricted

allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some [fol. 30] instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks."

While these cases involve state taxes, Congress had the power to exempt its Indian wards from paying them. But the Supreme Court held that exemption from taxation could not be deduced from the restricted status of the land. It further held that land purchased from accumulated savings was not as distinctly an instrumentality of government as the original allotment.

We can see no tenable distinction between land and personal property. If the surplus of an Indian invested in land is subject to state taxation, that surplus should be taxable if invested in a mortgage on the land, or in shares of stock. If Congress intended that such investments should be subject to state taxation, we can see no reason for holding that if intended to exempt the income from such investments from federal taxation. Every reason assigned for one applies to the other.

The whole question is one of statutory construction. Congress has the power to tax the income of an Indian from any source, just as it has the power to exempt all his property from state taxes. What did Congress intend? The Supreme Court has held it did not intend to exempt Indians as such from federal taxes; that it did not intend to exempt restricted property as such from state taxes; that property acquired for investment is not a federal instrumentality in the sense the original allotment is. While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation.

This view is supported by the administrative and legislative history. The Board of Tax Appeals in 1928 held that

the income received by the Superintendent of the Five Civilized Tribes from securities purchased for a Creek Indian with royalties from restricted land were subject to the income tax. Snell v. Commissioner, 10 B. T. A. 1081. In 1929, in the Blackbird Case, the Board extended this doctrine to include income from an original allotment and from minerals held in trust for the Tribe. This court reversed the Blackbird Case. After the Supreme Court af- [fol. 31] firmed the Choteau Case, the Commission promulgated a ruling, G. C. M. 9621, under which registered Indians are exempted from tax upon such incomes as were dealt with in the Blackbird Case, but taxed upon incomes from investments of income. Since then Congress has twice reenacted the income tax law, but has not disturbed this departmental ruling. On the contrary, in a Joint Resolution passed February 14, 1933, S. J. Res. 167, extending the time to members of Indian Tribes for filing claims for interest on refunds, Congress limited its application to (a) Indians who received allotments of land which were partially or wholly exempt from tax, and from which land the restrictions have or have not been removed, and (b) to taxes paid on "rents, royalties, or other gains arising from such allotted lands." Congress is therefore familiar with the distinction between income from the original heritage of the Indian and other income. There is, moreover, a reason for the distinction. The income from the allotments of many or most of the Indians is barely sufficient to support them; but oil was discovered upon the allotments of some, and those received an income much larger than their needs; when that surplus was invested and in turn produced income, there is reason in requiring such wealthy Indians to contribute to the cost of government whose services they enjoy. In the face of this history, we conclude that Congress is content with the administrative interpretation of its acts.

The order of the Board is Affirmed.

LEWIS, Circuit Judge:

I suggest a question of jurisdiction, and am inclined to the belief that power in this court to review the Board's order does not exist. We have this anomalous procedure: The Superintendent of the Five Civilized Tribes filed a petition for review. He is an officer in the Interior De-

partment. Counsel who represent him were employed by the Interior Department. Respondent, Commissioner of Internal Revenue, is also an officer in an executive department of the government, and he is represented by counsel in that department. Petitioner contends that Sandy Fox, an Indian whom he professes to represent, and his property are not subject to an income tax, and respondent contends to the contrary. Is this a case or controversy over which this court has jurisdiction? In Old Colony Tr. Co. v. Comm'r. Int. Rev., 279 U. S. 715, the court in construing [fol. 32] the act conferring jurisdiction on Circuit Courts of Appeal to review the orders of the Board of Tax Appeals quoted with approval this from the opinion of Mr. Justice Field in 32 Fed. 241, 255:

"The judicial article of the Constitution mentions cases and controversies. • • • The term (case) implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The Chief Justice then said:

"The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the Bakelite case, supra, and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

"In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power."

So the question arises whether the parties are adversaries in a case or controversy within our jurisdiction, or whether being officers of the United States Government they are only seeking advisory instructions.

But on the merits I disagree with the conclusion reached by my associates. The Act of May 27, 1908 (35 Stat. 312) applies to the Five Civilized Tribes. We held in Bagby v. United States, 60 F. (2) 80, and in Pitman v. Comm'r Int. Rev., 64 F. (2) 740, that under the facts in each of those

cases said act removed the restrictions from the allotments there under consideration, that such removal rendered each of said allotments subject to taxation, and that the rentals or royalties from said allotments were income subject to federal income tax. We further held in Chouteau v. Comm'r Int. Rev., 38 F. (2) 976, that a certificate of competency issued to and held by Chouteau under section 2 of the Act of June 28, 1906 (34 Stat. 539) removed the restrictions from his allotment and perforce thereof from his income therefrom and rendered said income subject to federal taxa-
[fol. 33] tion; that said certificate exempted Chouteau and his property from federal supervision, excepting his homestead; that it gave him full power to use and dispose of his property according to his own judgment and thus there was imposed on him and he assumed the same burden as other individual property owners. The Supreme Court affirmed our judgment in the Chouteau case. Chouteau v. Comm'r, 283 U. S. 691. It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention.

Sandy Fox, the taxpayer, is a full-blood Creek Indian enrolled as a member of that tribe under a given number. It was stipulated that he and his property, both real and personal, are restricted, and that his property is under the direct supervision of the Superintendent of the Five Civilized Tribes subject to the direction of the Secretary of the Interior; that income from his allotment is so received and held; that interest on such income when invested is likewise received and held in trust as a part of his restricted funds and property. There has been no removal of restrictions as to him or his property. Nevertheless the Board held said income to be taxable. I think the Board erred. We held to the contrary in Mary Blackbird v. Comm'r Int. Rev., 38 F. (2) 976. I can add nothing to what we said in her case. She was a full blood member of the Osage tribe. Her property from which income was received was restricted, and she did not have a certificate of competency. Like Fox, she was a ward of the government of the United States, and, like

him, she had no other guardian. We held she was not subject to the tax. I can see no material difference between her and her property on the one hand and Fox and his property on the other as to the point here involved. Not only does the majority opinion overrule the Mary Blackbird case, it also disregards the wholesome doctrine of *stare decisis*.

It is the duty of a trustee to invest funds in his hands. 1 Perry on Trusts, 5th Ed., Sec. 452. Interest received by him should be added to the trust estate. United States v. Brown, 8 F. (2) 567.

[fol. 34] It is true that the rights and duties of citizenship were conferred on Fox by section 6 of the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1901 (31 Stat. 1447); but it was appropriately said by the Eighth Circuit in United States v. Gray, 201 Fed. 291, 293:

"The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights to it from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

See also National Bank v. Anderson, 147 Fed. 87, 90.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

JUDGMENT—Jan. 9, 1935

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals in this cause be and the same is hereby affirmed; and that Commissioner of Internal